88-187

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1988

HOWARD GROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a Defendant, who has been subjected to overly broad cross-examination at a pretrial suppression hearing has made a knowing, voluntary and intelligent waiver of his Fifth Amendment rights?

II. Whether it is a denial of due process of law to convict the accused in a trial in which there is no evidence of one of the elements necessary to constitute the offense charged?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

Petitioner, HOWARD GROSS, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Illinois Court of Appeals which was entered on February 8, 1988. Leave to Appeal to the Illinois Supreme Court was denied on June 3, 1988.

OPINION BELOW

The opinion of the Illinois Appellate Court in the above-entitled cause dated February 8, 1988 affirmed the judgment of conviction which was entered by the Circuit Court of Cook County. The opinion of the Appellate Court is reported at 166 Ill.App.3d 413, 519 N.E.2d 1043, 116 Ill.Dec. 828 (1988) and appears as Appendix A. On March 7, 1988 Petitioner filed a timely petition for leave to appeal to the Illinois Supreme Court which was denied on June 3, 1988.

JURISDICTION

The opinion and judgment of the Illinois Appellate Court was entered on February 8, 1988. A timely petition for leave to appeal to the Illinois Supreme Court was denied on June 3, 1988, that order appearing herein as Appendix B. This petition was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 USC § 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTE AT ISSUE

AMENDMENT IV TO UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION:

Section 1.

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws.

ILLINOIS REVISED STATUTES, chapter 38, para. 9-1(a) (1962)

(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

STATEMENT OF THE CASE

Defendant, Howard Gross, was charged in a two count indictment with murder and armed violence. Defendant filed a timely pretrial Motion To Suppress, which the trial Court denied after a hearing. Defendant was convicted of murder at a later bench trial and sentenced to twenty years in prison. The Defendant was sixty four years old and medically disabled at the time of the incident.

Defendant testified in support of his Motion To Suppress Evidence and Statements. In brief and very limited testimony, the Defendant authenticated photographs of his residence located at 7403 West 60th Place in Summit, Illinois. He related that on July 15, 1983 he was at home when police officers arrived at his door. The officers did not display an arrest or search warrant. Defendant categorically denied that he gave the officers permission to enter his residence.

On cross-examination, over vigorous and continuing objection by Defendant's counsel, the Trial Court allowed the State to engage in a lengthy line of questioning concerning the events that occurred prior to the police officer's arrival at the Defendant's doorstep. During the cross-examination Defendant testified that he was inside his apartment and could not see, but did overhear, what he concluded to be a scuffle outside. He then looked outside and saw his brother Cletus lying on the sidewalk face down. He testified that he wanted to help Cletus but could not get over the fence that separated his residence from the neighboring property. Defendant stated that he then went back inside his residence and attempted unsuccessfully to place a phone call to the police.

Continuing the cross-examination, the State extracted testimony from the Defendant concerning his actions in defense of his brother which occurred long before the police arrived to search Defendant's apartment. The court stated that it was "concerned as to those things that happened before they got in, and as far as entry is concerned." (R. 53). The Motion To Suppress was later denied based upon the trial court's determination that Defendant had tried unsuccessfully to call the police earlier, so he must have consented to their entry into his apartment later in the day.

At the bench trial, Defendant took the stand and testified in his own behalf. During cross-examination, the

Defendant's responses to cross-examination from the suppression hearing were used to impeach him which ultimately led to his conviction.

Also at trial, the State, by way of stipulation, offered medical evidence that the decedent was a 22 year old male who weighed 210 pounds and was 5'10" tall. The Defendant testified that he was 64 years old, weighed 275 pounds and was about 5'5" tall. The pathologist who performed an autopsy on the decedent found that the victim died of a single gunshot wound to the neck which perforated the trachea, esophagus and lacerated the spinal cord. The bullet coursed from front to back, slightly right to left, and slightly downward.

The trial court found Defendant guilty of murder and entered judgment on the findings. The trial court made note of the fact that there was no evidence that would give rise to a finding of manslaughter and that there was no evidence of self defense.

REASONS FOR GRANTING WRIT

A.

A DEFENDANT WHO WAS SUBJECTED TO OVERLY BROAD CROSS EXAMINATION AT A PRETRIAL SUPPRESSION HEARING DID NOT MAKE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF HIS FIFTH AMENDMENT RIGHT.

To protect his rights under the Fourth Amendment against unreasonable search and seizure, Defendant Gross made a Motion To Suppress the gun and statements that the police obtained at his home for lack of consent to enter. In order to prove that police entry was without consent, Gross was obligated to testify as to the circumstances under which the police entered his home and searched for the weapon

placed in evidence by the prosecution during his trial. However, over defense objection, Gross was cross-examined at length concerning the entire case, above and beyond the scope of his motion to suppress. Defendant was forced to choose between answering the improper questions or abandoning his motion to suppress. Refusing to relinquish his Fourth Amendment rights, he answered the State's questions. At trial, the Defendant was impeached with this prior testimony, again over objection. Therefore, testimony that the Defendant was coerced into giving at the suppression hearing was used against him at trial. To force the Defendant Gross to waive his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment right is a violation of the right to due process of law. *Bailey v. United States*, 389 F.2d 305, 310 (1967).

A Defendant's testimony at a prior hearing can constitutionally be used at trial to impeach his testimony. *Simmons v. United States*, 390 U.S. 377 (1968). This is not disputed. However, that prior testimony must first be obtained within the constitutional safeguards of the Fifth Amendment. In this case, it was not.

The Defendant did not waive his Fifth Amendment right. A waiver of a constitutional right must be voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 748 (1970); accord, *People v. Johnson*, 75 Ill.2d 180, 187, 387 N.E.2d 688, 690 (1979). The Defendant's "waiver" was coerced and involuntary. Gross made his Motion to Suppress to address only the issue of whether he consented to a search of his home. The court, however, allowed the State to engage in a "fishing expedition" designed solely to circumvent the Fifth Amendment's well recognized limitation upon pretrial discovery in a criminal case.

Cross examination is limited to matters covered on direct examination. *People v. DuLong*, 33 Ill.2d 140, 144, 210 N.E.2d 513, 515 (1965). The right is restricted to matters which ex-

plain, modify, or discredit the earlier testimony. *People v. Welch*, 22 Ill.2d 558, 177 N.E.2d 160 (1961). The purpose of the State's questioning was not to explain the Defendant's testimony. It was intended, rather, to explain the arresting officer's motivation for entry into the Defendant's residence. The Defendant testified simply that he was not shown a search warrant and did not consent to the officer's entry. By testifying to those limited facts the Defendant did not "open up" for cross examination all events that occurred that day. Therefore, the court should have sustained Defendant's objection since the State's inquiry of the shooting incident itself was neither within the scope of direct examination nor germane to the issue raised by the Motion To Suppress. See, *People v. Smith*, 67 Ill.App.2d 952, 385 N.E.2d 707 (5th Dist. 1979).

By permitting the State to question Gross beyond the scope of his Motion To Suppress, and subsequently allowing this unlawfully obtained testimony to be used at trial, the trial court violated the Defendant's Fifth Amendment right not to incriminate himself. The Defendant was forced to barter his constitutional protection against unlawful search and seizure as the price of his good faith effort to exclude the evidence the State had obtained without a warrant. To force the Defendant to choose between waiving his Fifth Amendment right or foregoing another substantial benefit is no choice at all, and cannot be considered a voluntary waiver. *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967). See also, *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973). (Where a substantial economic sanction is used to secure a waiver, the waiver is not voluntary).

Simply put, Gross had no choice. He was forced to take a desperate chance in order to secure the exclusion of the gun and his statement to the police. Failing in his proof he was forced to pay the unconscionable price of having his testimony used to impeach him at trial. "It is intolerable that

one constitutional right should have to be surrendered in order to assert another." *Simmons* at 394.

Use of the Defendant's earlier testimony to impeach him at trial made a vivid impression on the trier of fact and in substantial part resulted in Gross' murder conviction. When evidence is improperly admitted, as is the case here, there exists far more than a "reasonable possibility" that the evidence contributed to the conviction which is necessary for reversal. *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). Consequently, it cannot be said that the impeachment of the Defendant at trial was harmless when in fact it resulted in his conviction.

Therefore, the trial court erred in permitting the Defendant's involuntary, coerced and self incriminating testimony in support of his Motion To Suppress to be used to impeach him at trial.

B.

DEFENDANT WAS NOT PROVEN GUILTY OF MURDER BEYOND A REASONABLE DOUBT

While it has been established that Howard Gross shot Greg Horn, the State has failed to prove, beyond a reasonable doubt, that Gross possessed the requisite mental state.

Gross testified that Horn grabbed Gross from behind. During the struggle Gross accidentally shot Horn, but had not intended to shoot him. The State is required to prove otherwise beyond a reasonable doubt. "...The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he was charged." *In Re Winship*, 397 U.S. 358 (1970).

The elements of murder are the knowing, intentional and unlawful taking of another's life. Ill.Rev.Stat. ch. 38, para. 9-1(a) (1962); *People v. Clemens*, 9 Ill.App.3d 312, 317, 292 N.E.2d 232, 236 (1st Dist. 1972). The least that the State must prove is that the Defendant voluntarily and wilfully committed an act, the natural result of which would be the death of another. *People v. Calhoun*, 4 Ill.App.3d 683, 689, 281 N.E.2d 363, 367 (1st Dist. 1972).

There was no direct evidence of intent. The entire case on this point was circumstantial. Therefore, it was incumbent upon the State to present evidence from which intent could be inferred. Although the State presented no such evidence, the Illinois Appellate Court majority failed to examine this insufficiency and instead concentrated solely on the weakness of the Defendant's case. This is in direct contradiction to established case law in Illinois which states that a conviction must be sustained based on the strength of the People's case and not on the weakness of Defendant's case. *People v. Coulson*, 13 Ill.2d 290, 149 N.E.2d 96 (1958); *People v. Villalobos*, 53 Ill.App.3d 234, 368 N.E.2d 556 (1st Dist. 1977).

Specifically, the Illinois Appellate Court majority relied on circumstantial evidence as to the plausibility of the Defendant's version of the incident. As Justice Manning noted in dissent, the majority's view, that the trajectory of the bullet and the height of the parties together with a gunshot wound to the neck is inconsistent with the Defendant's version, is based solely on "speculation and conjecture." The majority claimed that if the event occurred as the Defendant states, the wound would have been in the victim's chest, not his neck. However, the State's own evidence established that the stippling on the victim's neck is indicative of a close to intermediate range gunshot and, therefore, is consistent with the Defendant's story. Thus, it is clear that, contrary to the majority opinion, the Defendant's version of what transpired was in fact corroborated by the physical evidence.

Furthermore, the State presented no witnesses to testify that the shooting did not happen as the Defendant stated. Instead, as Justice Manning pointed out, the Appellate Court improperly based its decision on the incredibility of the Defendant's testimony. The trier of fact should not disregard or reject the Defendant's testimony unless it is so unreasonable as to be judged improbable. *People v. Harling*, 29 Ill.App.3d 1053, 1059, 331 N.E.2d 653, 658 (1st Dist. 1975); *People v. Walden*, 43 Ill.App.3d 744, 749, 2 Ill.Dec. 255, 357 N.E.2d 232, 259 (1st Dist. 1976). Even rejection of the Defendant's testimony does not relieve the State of its burden to prove guilt beyond a reasonable doubt. Alternatively, even improbability of the Defendant's testimony does not constitute proof beyond a reasonable doubt sufficient to sustain a conviction. *People v. Jordan*, 4 Ill.2d 155, 163, 122 N.E.2d 209 (1954).

Exclusive of the tainted impeachment testimony, the State based its case against the Defendants on two points: (1) that Horn was dead, and (2) that the Defendant shot him. Yet the State is required to prove that the Defendant had the requisite intent to kill. Mere rejection of Defendant's testimony cannot be equated with the State's contention that Defendant intended to shoot the decedent. Justice Manning's dissent correctly stated that the evidence presented by the Defendant had neither been contradicted in its material parts by competent evidence, nor was so implausible that it should be completely disregarded by the trier of fact. The State, therefore, failed to establish the Defendant's guilt beyond a reasonable doubt.

CONCLUSION

From the above and foregoing several premises petitioner prays that your Honors will adjudge his complaints to be of sufficient constitutional magnitude to warrant this Court's review on writ of certiorari.

Respectfully submitted,

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APPENDIX A

166 Ill.App.3d 413
519 N.E.2d 1043

**PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

Howard GROSS, Defendant-Appellant.

No. 85-2292.

Appellate Court of Illinois,
First District, First Division.

Feb. 8, 1988.

Defendant was convicted of murder by the Circuit Court, Cook County, George M. Marovich, J., following bench trial. Defendant appealed. The Appellate Court, O'Connor, J., held that: (1) the trial court did not improperly allow cross-examination of defendant at suppression hearing to exceed scope of direct examination; (2) evidence was sufficient to prove defendant guilty beyond reasonable doubt; (3) the trial court did not err by refusing to allow defendant to answer question concerning specific intent to commit murder; and (4) evidence recovered in warrantless search of defendant's apartment was admissible.

Affirmed.

Manning, J., dissented and filed opinion.

1. Witnesses 269(1)

General rule is that cross-examination is limited to matters covered on direct examination; however, rule is modified to the extent that cross-examination may develop all circumstances within knowledge of witness which explain, qualify, discredit, or destroy direct testimony.

2. Criminal Law 539(2)
Witnesses 379(8)

When defendant testifies in support of motion to suppress evidence, testimony may not subsequently be admitted against defendant at trial on issue of guilt; however, testimony may be used for impeachment purposes if defendant chooses to testify at trial.

3. Witnesses 379(8)

Although questions put to defendant on cross-examination during hearing on motion to suppress focused on events occurring prior to events testified to on direct examination, questions were all directed toward explaining, qualifying, or discrediting statements on direct examination; therefore, cross-examination was proper and cross-examination testimony could be used for impeachment purposes at murder trial.

4. Witnesses 268(1)

Whether cross-examination at suppression hearing was impermissibly broad depended on content of cross-examination, not on comparative number of pages of direct examination and cross-examination.

5. Homicide 9

Person who kills individual commits murder not only when he intends to kill another individual, but also when he intends to do great bodily harm, or when he knows that his acts create

strong probability of death or great bodily harm, or when he is attempting or committing forcible felony.

6. Homicide 9, 15

In order to prove crime of murder, it is not necessary to show that defendant had specific intent to kill or do great bodily harm or that defendant knew acts would achieve those results; all that need be proven is that defendant voluntarily and willfully committed act, the natural tendency of which was to destroy another's life or inflict great bodily harm.

7. Homicide 145

Intent required for murder conviction can be implied or inferred from character of the act, including fact that defendant used deadly weapon.

8. Criminal Law 554

Although murder defendant was under no duty to prove innocence, having chosen to explain death of victim that only he had knowledge of, it was incumbent upon defendant to tell reasonable story or be judged by its improbabilities.

9. Homicide 248

Evidence was sufficient to prove defendant guilty of murder beyond reasonable doubt, despite claim that shooting was accidental.

10. Criminal Law 254.3

Murder defendant was not denied fair trial, in bench trial, by the trial judge's actions in losing patience with defendant during cross-examination and stating "I give up"; trial judge did not "give up" on hearing evidence with open mind, but rather, gave up on admonishing defendant as to proper manner of answering questions.

11. Witnesses 246(2)

Trial judge has right to question witnesses in order to elicit truth or clarify material issues which seem obscure as long as trial judge does so in fair and impartial manner.

12. Criminal Law 656(2)

Trial judge did not improperly assume role of prosecutor during bench trial when he questioned murder defendant regarding facts of shooting; rather, trial judge merely sought to clarify evidence.

13. Criminal Law 1064(4)

Issue, which concerned whether trial court erred in not permitting murder defendant to testify regarding specific intent to kill and which was not raised in written motion for new trial, was waived.

14. Criminal Law 1170(4)

Trial court did not prejudice murder defendant by refusing to let defendant answer question concerning whether he intended to shoot victim; defendant was permitted to testify that gun went off accidentally during struggle and such testimony necessarily indicated lack of intent.

15. Criminal Law 394.6(4)

In motion to suppress evidence unlawfully seized, defendant has burden of proving that search and seizure were unlawful. U.S.C.A. Const.Amend. 4.

16. Searches and Seizures 40

"Probable cause," for purposes of determining lawfulness of warrantless search, is reasonable belief that search of particular place will disclose evidence, fruits of crime, or is necessary for protection of police officer. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

17 Searches and Seizures 194

Where prosecution seeks to rely upon consent to justify lawfulness of search, the State must prove by preponderance of evidence that consent was voluntarily given; consent may be in form of words, gesture, or conduct. U.S.C.A. Const.Amend. 4.

18. Searches and Seizures 172

Conduct of suspect, who opened apartment door for police, left door open, and walked over to and sat down at kitchen table during conversation with police, manifested consent to entry of apartment by police. U.S.C.A. Const.Amend. 4.

19. Searches and Seizures 43

Exigent circumstances justified officers' warrantless, peaceful entry into suspect's apartment; after arriving at scene of homicide, officers were told that killer had gone into suspect's building. U.S.C.A. Const.Amend. 4.

Michael D. Ettinger, Barry S. Pechter, Oak Lawn, for defendant-appellant, Howard Gross.

Richard M. Daley, State's Atty., Sharon Gaull, Elizabeth Sklarsky, Chicago, for plaintiff-appellee.

Justice O'CONNOR delivered the opinion of the court:

Following a bench trial, defendant Howard Gross was convicted of the murder of Gregory Horn and sentenced to 20 years in the Illinois Department of Corrections. On appeal, he raises the following issues: (1) whether, during the pretrial hearing on a motion to suppress, the trial court erred in allowing the prosecution's cross-examination to exceed the

scope of the direct examination; (2) whether defendant was found guilty of murder beyond a reasonable doubt; (3) whether the trial court erred in not allowing defendant to answer a question regarding his specific intent to commit murder; and (4) whether the trial court erred in denying defendant's motion to suppress evidence recovered as a result of the warrantless search of defendant's apartment. We affirm.

On July 15, 1983, defendant was arrested for the murder of Gregory Horn. The evidence of the events up until the time of the shooting is not in dispute. On the evening of July 15, 1983, Gregory Horn was visiting with friends on a roof-top patio located at 7405 W. 60th Place in Summit, Illinois. The building next door, at 7403 W. 60th Place, was owned by defendant's brother Cletus Gross. Defendant and his mother occupied the first floor of 7403 and the second floor was rented by Horn's girlfriend.

At about 9:00 that evening, prior to going to 7405 W. 60th Place, Horn had gone into his girl friend's apartment to take a shower. Defendant testified that he heard Horn going up to the apartment and told him that he didn't belong there as no one was at home. Horn responded that he would go into the apartment whenever he wanted to. Defendant testified that he intended to call the police, but before he could do so, he saw his brother, Cletus, in the back yard. Cletus offered to take care of the situation, and about 30 minutes later went over to 7405 W. 60th Place to talk to Horn. Cletus testified that he and Horn had a conversation during which Cletus asked for Horn's keys to the upstairs apartment. After Cletus told Horn he "had no business there," Horn allegedly began using vulgar language and then hit Cletus twice with his fists, once on the forehead above the right eye and once on his left ear.

The evidence as to what occurred after this point varies. At the hearing on defendant's motion to suppress certain

evidence and statements, defendant testified that on the evening of July 15, 1983, he heard a scuffle outside of his apartment. He first stated that he looked outside and saw his brother, Cletus, fall face down on the sidewalk but later stated that he did not actually see him fall. He testified that he went to help Cletus but could not get over the fence between his property and a neighboring house. He stated that he then went back into his house to call the police, but "did not get the number."

After unsuccessfully trying to call the police, he picked up his gun, which was lying on the air conditioner, and went back into the yard. He stated that he went over to the fence and looked into the alley. He then was grabbed with a "choke lock" by someone who tried to pull him over the fence. He stated that he tried to hit the man over his shoulder. After the person fell to the ground, he went into the house to call the paramedics. He stated that he thought Cletus might be dead and he "knew what was wrong" with the other person. He was unable to reach paramedics due to a problem with his phone and did not know whether Cletus or someone else finally called the police.

Officer John Gieseler testified that he responded to a call that took him to the area of 7403 to 7405 60th Place in Summit. He saw the victim lying in the gangway and was told by Fred Patrick that the offender had gone into the first building east of the gangway. Officers Gieseler, Stancato and Hyde then walked into the building. They knocked on the closed door of defendant's apartment and advised Mr. Gross that there had been a shooting and asked if anyone had come in. Mr. Gross stepped out of the way and walked over to the kitchen table and sat down, leaving the door open.

Officer Michael Stancato testified that the apartment door was open and that he had a conversation with defendant. The defendant stated that he had shot the victim and told the of-

ficer where the gun was located. Officer Stancato then recovered the gun from the top of the air conditioner.

Defendant's motion to suppress the gun and the statements made to the police was denied based on the trial court's finding that the entry into defendant's house was consensual and that the gun was retrieved only after defendant informed the officers of its location.

Several hours after the incident, Cletus Gross was interviewed by an assistant State's Attorney in the presence of an attorney representing defendant. During the interview, Cletus stated that Horn struck him on the forehead but that he did not fall down. He told the State's Attorney that after he was hit, he heard a shot. He looked around and saw Horn falling and then turned and saw his brother. He also said that he saw "a big long thing . . . in [my] brother's. . . ." but did not complete the statement.

The testimony Cletus gave at trial varied substantially from the statement he made the night of the incident. At trial, Cletus testified that after Horn hit him, he flew 4 or 5 feet through the air, landed face down on the concrete and lost consciousness for an indeterminate period of time. He described the sound he had heard as an "explosion" rather than a shot and testified that he did not know what the sound was. He also testified that at no time between when he and Horn had their conversation until after the police arrived did he see defendant outside of defendant's apartment.

Cletus also testified that he went to a hospital emergency room the day after the incident but he was told that there was no damage and that he needed no treatment. Officer Stancato, who arrived first at the scene and talked to Cletus upon his arrival, testified at trial that he had observed no apparent injuries to Cletus other than a slight redness around his ear.

At trial defendant testified that he heard a commotion outside and when he went outside saw Cletus come "flying out

from between the two houses" and land face down on the sidewalk. Before he went over to Cletus, he went back into his house to get his gun, which he kept on the air conditioner. Defendant denied that he went back to call the police after first observing his brother on the ground.

Carrying his gun, defendant walked over to where his brother was lying. He testified that when he turned to look toward the street, someone grabbed him from behind. He stated that he hit the person by holding his gun in his right hand with his finger on the trigger and swinging it over his left shoulder. The person who was holding him tried to take the gun away by jerking it out of his hand. During the struggle, the gun fired once. After the gun was fired, the hold on him was released and defendant walked back into his apartment. Defendant stated that he knew there were two "bodies" lying on the ground.

Officer Stancato testified that when he arrived at the scene he talked to Cletus, who was standing at the curb. He asked Cletus what had happened but Cletus said he did not know. According to Officer Stancato, the defendant first told the police that he did not know who shot the victim and did not know where the gun was. When asked a second time, defendant admitted shooting the victim and told the officers where the gun was located.

Medical evidence was offered by way of stipulation and revealed that the victim was a 22 year old male who weighed 210 pounds and was 5'10" tall. The pathologist who performed an autopsy on the victim concluded that the victim died from a single gunshot wound to the neck which perforated the treachea and esophagus and lacerated the spinal cord. the bullet coursed from front to back, slightly right to left, and slightly downward. The defendant testified that he was 64 years old, was about 5'5" tall and weighed 275 pounds.

In finding defendant guilty of murder, the trial court noted that there was no evidence that would give rise to a finding

of manslaughter, nor was there any justification for the shooting. The trial court also weighed defendant's credibility and based on the many inconsistencies in the testimony coupled with the physical and medical evidence, determined that the shooting was not accidental. Defendant now appeals.

Defendant's first contention is that the trial court improperly allowed cross-examination of the defendant to exceed the scope of the direct examination at the hearing on his motion to suppress. Defendant maintains that he was prejudiced by his cross-examination because the trial court considered the statements he made during cross-examination in finding him guilty of murder. The State maintains that the cross-examination was proper because it developed the circumstances regarding the officers' appearance at defendant's apartment and explained why it was permissible for them to enter his home without a warrant.

[1] The general rule is that cross-examination is limited to matters covered on direct examination (*People v. DuLong* (1965), 33 Ill.2d 140, 144, 210 N.E.2d 513), however, the rule is modified to the extent that cross-examination may develop all circumstances within the knowledge of the witness "which explain, qualify, discredit or destroy his direct testimony." (*People v. Perez* (1981), 98 Ill.App.3d 64, 70, 53 Ill. Dec. 295, 423 N.E.2d 964, *appeal denied*, 85 Ill.2d 572.) A defendant who testifies on his own behalf subjects himself to legitimate and pertinent cross-examination, the scope of which rests within the sound discretion of the trial court. *People v. Torres* (1985), 130 Ill.App.3d 775, 781, 86 Ill.Dec. 108, 474 N.E.2d 1305.

[2] When a defendant testifies in support of a motion to suppress evidence, his testimony may not subsequently be admitted against him at trial on the issue of guilt but it may be used by the State for impeachment purposes if the defendant chooses to testify at trial. (*People v. Smith* (1978), 67 Ill.App.3d 952, 958, 24 Ill.Dec. 566, 385 N.E.2d 707, citing

Simmons v. United States (1968), 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247; *People v. Sturgis* (1974), 58 Ill.2d 211, 317 N.E.2d 545.) What constitutes proper cross-examination is for the court to determine, and its decision will not be disturbed unless there is a clear abuse of discretion which results in manifest prejudice to the defendant. *People v. Burris* (1971), 49 Ill.2d 98, 104, 273 N.E.2d 605.

Defendant's motion to suppress alleged that the Summit police officers' entry into his residence was illegal because they did not have a warrant to search the premises or to arrest him and because he did not consent to the search of his apartment. At the hearing on the motion to suppress, he testified on direct examination that the police came to his apartment but did not show a search warrant or an arrest warrant. Defendant stated that he opened his door in response to the officers' knock and then sat down beside a table. The officers came into the apartment and defendant told them where he had put the gun. He further testified that he did not give the officers permission to enter his apartment. On cross-examination, over defense objections, the court allowed the prosecution to pursue a line of questioning as to whether the defendant knew why the police were at his home.

[3] Although the questions put to him on cross-examination focused on events occurring prior to the events testified to on direct examination, the questions were all directed toward explaining, qualifying or discrediting his statements on direct examination. That there had been a man killed outside of his house in an incident in which he was involved would explain why the police sought to question defendant and would provide the police with both probable cause and exigent circumstances to enter defendant's apartment. Under these circumstances, we find that the cross-examination of defendant was not improper and that the use of the testimony at trial for impeachment purposes did not constitute an abuse of discretion.

[4] We also find no merit in defendant's contention that the comparative number of pages indicated that the cross-examination was impermissibly broad. It does not follow that because there were five pages of direct examination, the prosecutor should be limited to a certain number of pages of cross-examination. At issue is solely whether the content of the cross-examination was proper. The cases cited by defendant address the question of whether the trial court improperly limited cross-examination and thus do not support his argument here. See *People v. Kilgore* (1976), 39 Ill.App.3d 1000, 350 N.E.2d 810, *appeal denied*, 63 Ill.2d 560.

Defendant also contends that he was not found guilty beyond a reasonable doubt of murder because the State failed to prove that he acted with the requisite mental state when he killed Gregory Horn. He asserts that since the State's case was entirely circumstantial and since he presented a reasonable hypothesis of innocence, that hypothesis must be accepted pursuant to *People v. Calhoun* (1972), 4 Ill.App.3d 683, 690-91, 281 N.E.2d 363.

The State's case included evidence that shortly before the shooting, defendant's brother Cletus had asked Horn to return the keys to his girl friend's apartment, that witnesses heard a shot, that defendant stated to police that he shot Horn and that the gun was recovered from defendant's apartment. It was undisputed that the defendant shot and killed Horn and the only issue to be resolved is whether the State established that he did so with the requisite mental state to support a conviction for murder.

[5-7] A person who kills an individual commits murder not only when he intends to kill another individual, but also when he intends to do great bodily harm, or when he knows that his acts create a strong probability of death or great bodily harm, or when he is attempting or committing a forcible felony. (*People v. Harris* (1978), 72 Ill.2d 16, 23-24, 17 Ill.Dec. 838, 377 N.E.2d 28.) In order to prove the crime of murder,

it is not necessary to show that the defendant had a specific intent to kill or do great bodily harm or that he knew that his acts would achieve those results. (*People v. Bartall* (1983), 98 Ill.2d 294, 307, 74 Ill.Dec. 557, 456 N.E.2d 59.) All that need be proved is that the defendant voluntarily and willfully committed an act, the natural tendency of which was to destroy another's life or inflict great bodily harm. (*People v. Szerletich* (1980), 86 Ill.App.3d 1121, 1124, 42 Ill.Dec. 389, 408 N.E.2d 1098.) Intent can be implied or inferred from the character of the act, including the fact that defendant used a deadly weapon. (See *People v. Koshiol* (1970), 45 Ill.2d 573, 578, 262 N.E.2d 446, *cert. denied* 401 U.S. 978, 91 S.Ct. 1209, 28 L.Ed.2d 329.) The question of intent is a question to be resolved by the trier of fact and that finding will not be reversed on appeal unless the finding is inherently impossible or unreasonable. *People v. Johnson* (1979), 70 Ill.App.3d 149, 153, 26 Ill.Dec. 601, 388 N.E.2d 225.

In finding the defendant guilty of murder, the trial court noted that any claim of self defense had no merit as there was no threat of imminent harm. The court also found that there was no evidence that would warrant a finding of manslaughter nor was there any justification for the shooting. The court also considered whether the shooting could have been accidental, and determined based on the medical evidence and the inconsistencies in the testimony that the incident would not have occurred in the way defendant claimed it had.

The defendant testified that he took a loaded gun with him to an area where an argument had just occurred. With his finger in the trigger, so that the gun was capable of being instantly fired, he engaged in a struggle with the victim. The court was not bound to believe defendant's story that there was a struggle for the gun or that the gun was fired accidentally. The defendant voluntarily and willfully committed an act, the natural tendency of which was to destroy another's

life or inflict great bodily harm and the requisite intent to commit murder can be inferred from this act.

[8, 9] Although the defendant was under no duty to prove his innocence, having chosen to explain the death of the victim that only he had knowledge of, "it was incumbent upon him to tell a reasonable story or be judged by its improbabilities." (See *People v. Neal* (1968), 98 Ill.App.2d 454, 458, 240 N.E.2d 784.) Unlike the defendant in *People v. Calhoun* (1972), 4 Ill.App.3d 683, 281 N.E.2d 363, the defendant here has offered no reasonable hypothesis of innocence that would create a reasonable doubt as to his guilt. In *Calhoun*, the physical evidence strongly supported the defendant's contention that the shooting was accidental.

In the instant case, to the contrary, the physical evidence does not support defendant's contention that the killing of Gregory Horn was accidental. Defendant claimed that although Horn was 5 inches taller than defendant, defendant had a gun held over his left shoulder that fired into Horn's neck and that the bullet took a downward course and traveled slightly right to left as it traveled through Horn's neck. Based on the relative heighths of Horn and defendant, it would have been virtually impossible for the bullet to have traveled downward through the victim's neck at that angle.

Defendant's contention that the victim was pulling the gun downward as they struggled over the gun is also not supported by the physical evidence. If Horn had been holding defendant's neck from behind defendant's back and the gun fired into him as defendant held it over his left shoulder while Horn was pulling it downward, the wound would most probably have been in the victim's chest rather than in the middle of his neck.

The testimony of defendant coupled with the medical testimony do not, in our view, support defendant's contention that the shooting was an accident. His claim had to stand or fall on the weight and credibility of his own testimony.

(*People v. Neal* (1968), 98 Ill.App.2d 454, 459, 240 N.E.2d 784.) On the record here, we believe the trial court was warranted in finding that defendant did not present a reasonable or credible defense and that the evidence presented by the State was sufficient to prove him guilty beyond a reasonable doubt.

[10] Defendant also contends that he was denied a fair trial because the trial court lost patience with him during cross-examination. During cross-examination, the assistant State's Attorney attempted to impeach defendant with his pre-trial hearing testimony. Defendant repeatedly refused to respond to questions in regard to whether he had made certain statements despite the fact that the trial court explained to him several times that the questions should be answered either "yes,", "no," or "I don't remember." After the trial court had admonished defendant for the third time and the defendant still refused to respond, the trial court stated "I give up."

The defendant cites *People v. Johnson* (1972), 4 Ill.App.3d 539, 281 N.E.2d 451, to support his contention that reversal is warranted where the trial judge has failed to hear the evidence with an open mind. In that case, the trial judge made a finding of guilty prior to the presentation of all of the evidence. The appellate court reversed, finding that the defendant had been denied a fair and impartial trial. That is not the situation here, where the trial court heard all of the evidence and evaluated it before rendering a decision. Upon reading the record it is clear that the judge did not "give up" on hearing the evidence with an open mind but did give up on admonishing the witness as to the proper manner of answering the questions.

[11, 12] Defendant further alleges that the trial court improperly assumed the role of advocate during the trial when he questioned defendant regarding the facts of the shooting. We disagree. After defendant's testimony had been interrupted numerous times because defendant had repeatedly

failed to be responsive to questions, the trial court attempted to clarify defendant's testimony. A trial court has the right to question witnesses in order to elicit truth or clarify material issues which seem obscure as long as he does so in a fair and impartial manner. (*People v. Marino* (1953), 414 Ill. 445, 450, 111 N.E.2d 534.) After reviewing the record, we conclude that the trial court did not impermissibly take on the role of prosecutor but merely sought to clarify the evidence. (*cf. People v. Cofield* (1973), 9 Ill.App.3d 1048, 1050-51, 293 N.E.2d 692.) Under the circumstances here, we find no abuse of discretion.

[13, 14] Defendant also claims that the trial court erred in not permitting him to testify regarding his specific intent to kill Horn as the question of intent is a crucial element of the charge of murder. This issue was not raised in the written motion for a new trial and therefore the issue is considered waived. (See *People v. Caballero* (1984), 102 Ill.2d 23, 31, 79 Ill.Dec. 625, 464 N.E.2d 223.) In any event, we believe that defendant's claim has no merit. The rejection of evidence is not prejudicial where substantially the same evidence is admitted in another stage of the trial (*People v. Wallace* (1981), 100 Ill.App.3d 424, 429, 55 Ill.Dec. 692, 426 N.E.2d 1017, *appeal denied*, 88 Ill.2d 554.) In this case, the defendant was asked by defense counsel whether he intended to shoot Greg Horn. The State's objection was sustained. The defendant did testify, however, that the gun went off accidentally during the struggle, and such testimony necessarily indicates a lack of intent on his part. In light of the fact that defendant was permitted to testify to substantially the same evidence, we find that there was no error.

Defendant's final contention is that the entry by police officers into his home was unreasonable because it was neither consensual nor based upon exigent circumstances and therefore the trial court erred in denying his motion to suppress the evidence. The State maintains that the entry was reasonable because it was based on probable cause, defen-

dant consented to the entry and it was based upon exigent circumstances. After reviewing the record, we believe that defendant not only consented to the entry, but that it was based on exigent circumstances.

[15, 16] In a motion to suppress evidence unlawfully seized, the defendant has the burden of proving that the search and seizure were unlawful. (*People v. McNair* (1983), 113 Ill.App.3d 8, 16, 68 Ill.Dec. 671, 446 N.E.2d 577, *cert. denied*, 464 U.S. 860, 104 S.Ct. 185, 78 L.Ed.2d 164.) A warrantless entry is unlawful unless there exists probable cause and either exigent circumstances or consensual entry. (*People v. Calhoun* (1984), 126 Ill.App.3d 727, 735, 81 Ill.Dec. 915, 467 N.E.2d 1037.) Probable cause is a reasonable belief that a search of particular place will disclose evidence, the fruits of the crime, or is necessary for the protection of the police officer. *People v. Hering* (1975), 27 Ill.App.3d 936, 941-942, 327 N.E.2d 583, *appeal denied*, 60 Ill.2d 599.

[17] Where the prosecution seeks to rely upon consent to justify the lawfulness of a search, the State must prove by a preponderance of the evidence that the consent was voluntarily given. (*People v. Smith* (1984), 124 Ill.App.3d 914, 919, 80 Ill.Dec. 223, 464 N.E.2d 1206.) The consent may be in the form of words, gesture, or conduct. (*U.S. v. Griffin* (7th Cir.1976), 530 F.2d 739, 742.) Whether the consent to enter was voluntarily given rather than the result of coercion or duress is a question for the trier of fact and we will not set aside a ruling of the trial court unless it is clearly erroneous. *People v. McNair* (1983), 113 Ill.App.3d 8, 16-17, 68 Ill.Dec. 671, 446 N.E.2d 577, *cert. denied*, 464 U.S. 860, 104 S.Ct. 185, 78 L.Ed.2d 164.

At the suppression hearing, the defendant testified on direct examination that he did not give the police officers permission to enter his apartment. On cross-examination, he testified that he opened the door for the officers and then

went inside and sat down at a kitchen table. The police then followed him into the apartment. He testified that "he wasn't going to stand in the doorway to keep them out."

[18] According to his own testimony, defendant attempted to call the police and the paramedics. When the police arrived and knocked on his door, defendant opened the door. The officers asked him if anyone had run inside. Defendant did not respond to the question but stated that there was no one home upstairs. He left the door open and walked over to the kitchen table and sat down at which time the police followed him into the apartment. As they were in the middle of a conversation when defendant walked into his apartment leaving the door open, it was reasonable for the officers to believe that defendant consented to their entering the apartment. Moreover, the officers did not rely on coercion or duress to gain entry into defendant's home. We concur with the trial court's finding that defendant's conduct manifested consent to enter his apartment.

[19] In the present case, we believe there were also exigent circumstances which justified the police officer's warrantless entry. (See *People v. Thompson* (1981), 93 Ill.App.3d 995, 1004, 49 Ill.Dec. 468, 418 N.E.2d 112, *cert. denied*, 458 U.S. 1109, 102 S.Ct. 3490, 73 L.Ed.2d 1371.) In order to determine whether exigent circumstances exist, the following factors must be considered:

> "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect 'is reasonably believed to be armed'; (3) 'a clear showing of probable cause . . . to believe that the suspect committed the crime'; (4) 'strong reason to believe that the suspect is in the premises being entered'; (5) 'a likelihood that the suspect will escape if not swiftly apprehended'; and (6) the peaceful circumstances of the entry." [citations omitted.] *People v. Sakalas* (1980), 85 Ill.App.3d

59, 65-66, 40 Ill.Dec. 29, 405 N.E.2d 1121, *appeal denied*, 81 Ill.2d 597.

These factors need not all be present; the determinative issue is whether the entry was reasonable under the circumstances. *People v. Rimmer* (1985), 132 Ill.App.3d 107, 114, 87 Ill.Dec. 286, 476 N.E.2d 1278.

In the present case, when the officers arrived at 7403-05 60th Place, they saw a body lying in the gangway bleeding from the head. People standing near the body stated that the victim had been shot by a person who had gone into the building immediately east of the gangway. The police thus had a strong reason to believe that the suspect was in defendant's apartment and that he was armed and violent. The police acted immediately upon arriving at the scene of a homicide after having received information establishing probable cause. There was not sufficient time to obtain a warrant, under the circumstances. It is also uncontested that the officers entered defendant's apartment peacefully. Based on our finding that exigent circumstances were present here, we conclude that the entry was reasonable.

For the reasons stated above, we affirm the judgment of the circuit court of Cook County. Additionally, pursuant to *People v. Nicholls* (1978), 71 Ill.2d 166, 15 Ill.Dec. 759, 374 N.E.2d 194, and *People v. Agnew* (1985), 105 Ill.2d 275, 85 Ill.Dec. 514, 473 N.E.2d 1319, we assess defendant $75 in costs for the State's defense of the instant appeal and hereby incorporate it as part of this judgment.

Judgment affirmed.

CAMPBELL, P.J., concurs.

MANNING, J., dissents.

Justice MANNING, dissenting:

I respectfully dissent. It is my opinion that the State came nowhere close to meeting its burden in proving the defendant guilty of murder beyond a reasonable doubt.

The elements of murder are the knowing, intentional and unlawful taking of another's life. (Ill.Rev.Stat.1983, ch. 38, par. 9-1(a); *People v. Clemens* (1972), 9 Ill.App.3d 312, 317, 292 N.E.2d 232.) While it is not necessary to show that the accused deliberately formed the intent to kill to justify a conviction of murder (*People v. Davis* (1966), 35 Ill.2d 55, 61, 219 N.E.2d 468; *People v. Walden* (1976), 43 Ill.App.3d 744, 752, 2 Ill.Dec. 255, 357 N.E.2d 232), the least that must be proved is that the defendant voluntarily and wilfully committed an act, the natural result of which would be the death of another. *People v. Calhoun* (1972), 4 Ill.App.3d 683, 689, 281 N.E.2d 363.

The evidence presented by the defendant was his sworn testimony that Greg Horn grabbed him from behind and in fighting him off, the gun discharged. In my opinion, the State has not presented any competent evidence to contradict the defendant's version of the incident. There are no occurrence witnesses other than the defendant who saw the shooting. The State did not present any forensic evidence to establish either the distance between the victim and the weapon at the time of the shooting or to show that the shooting could not have occurred as the defendant had testified. Rather, the State sought to establish its case on speculation and conjecture. It relies on a vague statement made by the defendant's brother and the fact that the victim was five inches taller than the defendant to establish the defendant's intent to commit murder.

The statement attributed to the defendant's brother, Cletus that while in a dazed state he heard a shot, looked and saw the victim falling, turned around and saw a "big long thing," was introduced only as impeachment of his testimony at trial. Let us examine what impeachment actually occurred.

Cletus testified at trial that after he was hit, he was "semi-unconscious and semi-conscious"; previously he had stated that he had been in a daze. At trial he testified that he heard an explosion; he allegedly described the noise to the assistant State's Attorney on the date of the shooting as a gunshot. Up to this point, the testimony is not necessarily inconsistent with his prior oral statement. The sole possible inconsistency is between his testimony at trial that when he looked up nobody was there and the oral statement which he allegedly gave the assistant State's Attorney indicating that he saw his brother when he looked up, even though at trial he did not remember making such a statement.

While there is no issue raised in this appeal regarding use of prior inconsistent statements, I consider it only in my analysis of the evidence herein for the purpose of determining if there is competent evidence in this record sufficient to sustain this conviction beyond a reasonable doubt.

Prior inconsistent statements may be admissible as substantive evidence if: (1) the statements are inconsistent with testimony at trial; (2) the witness is subject to cross-examination; (3) the statements are within the personal knowledge of the witness; and (4) the statements are acknowledged under oath or have been electronically recorded. (*People v. Hastings* (1987), 161 Ill.App.3d 714, 719, 113 Ill.Dec. 451, 515 N.E.2d 260; Ill.Rev. Stat., 1985, ch. 28, par. 115-10.1.) Cletus' statement, however, does not meet these requirements. He did not recall making the statement and the State did not introduce a recording of the alleged statement into evidence at trial nor was it in writing. Thus, while the statement may have been properly used to impeach the witness' credibility, it was not admissible as substantive evidence. The trial court correctly admitted it for nothing more than impeachment. In light of that, however, it is my judgment that the dearth of sufficient evidence to sustain a criminal conviction beyond a reasonable doubt is in this case readily apparent.

I further disagree with the trial court's conclusion and the majority's view that based upon the trajectory of the bullet and the height of the parties, the physical evidence does not support the defendant's version of the shooting. Again, there is no opinion testimony in the record, expert or otherwise, upon which this conclusion could be based or inferred. It is based solely on speculation and conjecture. It is not unreasonable to believe that during the course of a potentially life and death struggle between the 210 pound decedent and the 275 pound defendant, the gun may have discharged into the victim's neck rather than his chest. In fact, the medical evidence presented by the State establishes that there was stippling on the victim's neck, which is indicative of a close to intermediate range gunshot wound and is consistent with the defendant's story. Knowledge of the distance between the victim and the weapon at the time of firing may have disproved the defendant's claim; however, the State failed to introduce any such evidence.

The majority also holds that the conviction is proper because the only eyewitness, the defendant, was found to be incredible. Although the trier of fact is not obliged to accept the defendant's testimony as true, it should not disregard or reject testimony by the defendant which is not contradicted in its material parts unless it is so unreasonable as to be judged improbable. (*People v. Harling* (1975), 29 Ill.App.3d 1053, 1059, 331 N.E.2d 653; *People v. Walden* (1976), 43 Ill.App.3d 744, 749, 2 Ill.Dec. 255, 357 N.E.2d 232.) Even were the trier of fact to reject the defendant's testimony, the rejection does not have the effect of supplying proof of the defendant's guilt beyond a reasonable doubt sufficient to sustain a conviction. (*People v. Jordan* (1954), 4 Ill.2d 155, 163, 122 N.E.2d 209.) The trial court's rejection of the defendant's testimony that the shooting was an accident does not constitute evidence for the State that the defendant knowingly and intentionally shot the decedent. The State must prove the defendant's intent, and in my opinion, it has

not done so. The evidence presented by the State merely established that the defendant shot Greg Horn, not that the defendant killed him with the requisite mental state. The weakness of the defense does not relieve the State of its burden of proving its case beyond a reasonable doubt. I believe the evidence presented by the defendant has neither been contradicted in its material parts by competent evidence on the part of the State, nor is it so implausible that it should be completely disregarded by the trier of fact. The State has the burden of proof and it has failed to sustain it. In my view, the evidence in its totality is insufficient to establish the defendant's guilt beyond a reasonable doubt.

Based upon the foregoing, I would reverse the defendant's conviction.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
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June 3, 1988

Mr. Michael David Ettinger
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No. 66682 - People State of Illinois, respondent, v. Howard Gross, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1988.

(2)

NO.88-187

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

HOWARD GROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should decline to review the appellate court's conclusion that the cross-examination of petitioner at the hearing on his motion to suppress was appropriate where the appellate court decision was correct and was solely based on state law; where the claim that petitioner's Constitutional rights were violated was never raised below; and where the issue was never presented in the petition for leave to appeal to the Illinois Supreme Court.

II. Whether this Court should decline to consider whether petitioner was proven guilty beyond a reasonable doubt where petitioner has failed to raise any federal question, and has raised only issues of fact which are not matters of general importance meriting this Court's attention; and where, in any event, petitioner was proven guilty beyond a reasonable doubt.

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TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

HOWARD GROSS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

OPINION BELOW

The opinion of the Illinois Appellate Court in the above entitled cause, dated February 8, 1988, affirmed the judgment of conviction which was entered by the Circuit Court of Cook County. The opinion of the Appellate Court is reported at 166 Ill. App. 3d 413, 519 N.E.2d 1043 (1st Dist. 1988). On June 3, 1988 the petition for

leave to appeal to the Illinois Supreme Court was denied. 122 Ill. 2d 576 (1988).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. Sec. 1257(3). However, as to Issue I, there is no basis for review since this issue was resolved in the appellate court on adequate and independent state grounds; the issue, couched in Constitutional terms, was never raised prior to the instant petition; and the issue was not raised at all in the petition for leave to appeal to the Illinois Supreme Court. Further, this Court should decline review as to Issue II because the issue presents no federal question and the issue presents no question of general importance that would merit consideration by

this Court. Thus, petitioner has failed to present grounds warranting a grant of certiorari.

STATEMENT OF THE CASE

Petitioner was indicted for murder and armed violence. Petitioner's pre-trial motion to suppress was denied after a hearing. Petitioner was convicted of murder (with which the armed violence charge merged) after a bench trial and was sentenced to twenty years in prison.

REASONS FOR DENYING T[illegible] PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT SHOULD DECLINE TO REVIEW THE APPELLATE COURT'S CONCLUSION THAT THE CROSS-EXAMINATION OF PETITIONER AT THE HEARING ON HIS MOTION TO SUPPRESS WAS APPROPRIATE BECAUSE THE APPELLATE COURT'S DECISION WAS CORRECT AND WAS SOLELY BASED ON STATE LAW; BECAUSE THE CLAIM THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WAS NEVER RAISED BELOW; AND BECAUSE THE ISSUE WAS NEVER PRESENTED IN THE PETITION FOR LEAVE TO APPEAL TO THE STATE SUPREME COURT.

Petitioner asks that a writ of certiorari issue to review what he alleges, for the first time through the instant petition, to be a violation of his Fifth

Amendment rights. Petitioner claims that he was subjected to overbroad cross-examination when he testified during the hearing on his motion to suppress and petitioner now claims that because of the allegedly improper cross-examination his Constitutional rights were violated. Not only was this issue correctly decided by the Illinois Appellate Court, First District, solely under Illinois law, petitioner never raised an issue involving his federal Constitutional rights in the state court. And, though petitioner filed a petition for leave to appeal to the Illinois Supreme Court, he did not seek review of this issue in any form before that court.

In the hearing on petitioner's pre-trial motion to suppress evidence and statements, petitioner testified in his own behalf. (R. 4) On direct examination

petitioner testified that on the day of the shooting the police came to his house without a warrant. (R. 7) Petitioner opened his door in response to their knock and sat down as the officers quietly entered his apartment. (R. 7) Petitioner told the officers where he had put his gun. (R. 8) On cross-examination the trial court allowed the petitioner to be questioned as to whether he knew why the police were at his home. (R. 9-31)

In the Illinois Appellate Court, petitioner argued that the trial court improperly allowed the cross-examination to exceed the scope of direct examination and, as a result, he was prejudiced. Petitioner made no claim in the Illinois Appellate Court, as he does in this petition, that he was coerced into waiving his rights against self incrimination in order to assert his

rights against unreasonable searches and seizures. (Pet. for Writ of Cert. 6)

The Illinois Appellate Court found that the cross-examination of the petitioner was proper, and that the use of the testimony at trial for impeachment purposes was appropriate and within the court's discretion. (App. Ct. Op. at 11) The decision of the appellate court was based solely on Illinois law and was correct.

This Court has consistently held that where a state court judgment rests on adequate and independent state grounds, both substantive and procedural, this Court will decline to review the judgment. Henry v. Mississippi, 379 U.S. 443, 446 (1965). In the instant case, the appellate court opinion rests solely on principles of Illinois law. The principle that cross-examination may develop all circumstances within the

knowledge of the witness which explain, qualify, discredit or destroy his direct testimony, as was the situation here, is rooted in Illinois law. People v. Perez, 98 Ill. App. 3d 64, 70, 423 N.E.2d 964, 968 (4th Dist. 1981). Also resting on Illinois law is the appellate court's finding that petitioner's hearing testimony was properly used for impeachment purposes at trial. People v. Smith, 67 Ill. App. 3d 952, 958, 358 N.E.2d 707, 711 (5th Dist. 1978).

The appellate court did not consider the Constitutional dimension now proposed by petitioner because it was not heretofore raised. A federal claim must be raised or passed on in the state court in order for the United States Supreme Court to invoke its jurisdiction to consider it. Illinois v. Gates, 462 U.S. 213, 219 (1983). And, it is not sufficient merely to allege

the facts necessary to make a Constitutional claim while making a similar state law claim. Anderson v. Harless, 459 U.S. 4, 6 (1982). Thus, since this issue was neither raised, at least not in terms of a Constitutional violation, nor considered in the court below, this Honorable Court is without a reason to consider it.

And, in his petition for leave to appeal to the Illinois Supreme Court, petitioner raised no issue at all regarding the breadth of cross-examination at the motion to suppress. Thus, since the issue was neither presented to the Illinois Supreme Court in the petition for leave to appeal nor was it considered when that court denied the petition, this Court has no basis to review the issue.

In conclusion, the Illinois Appellate Court correctly applied Illinois

law in deciding this claim. Further, the federal question presented for the first time in this petition was never raised in the court below and petitioner did not present the issue in any form in his petition for leave to appeal to the Illinois Supreme Court. Therefore, there is no reason for this Court to consider this claim, and the petition for a writ of certiorari should be denied.

II.

THIS COURT HAS NO GOOD REASON TO CONSIDER WHETHER PETITIONER WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT BECAUSE PETITIONER HAS FAILED TO RAISE ANY FEDERAL QUESTION AND HAS RAISED ONLY ISSUES OF FACT WHICH ARE NOT MATTERS OF GENERAL IMPORTANCE MERITING THIS COURT'S ATTENTION. IN ANY EVENT, PETITIONER WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT.

Petitioner asks this Court to grant certiorari to decide whether petitioner's guilt was established beyond a reasonable doubt. Specifically, petitioner claims that the People did not present sufficient evidence from which petitioner's intent to commit murder could be inferred and petitioner seeks to have this Court review the factual findings of the courts below.

In this case, petitioner does not dispute that he shot and killed the victim. The sole question raised is whether the requisite intent to commit murder was sufficiently established by the evidence. In Illinois the question of intent is to be resolved by the trier of fact and that finding will not be reversed on appeal unless the finding is inherently impossible or unreasonable. People v. Johnson, 70 Ill. App. 3d 149, 153, 388 N.E.2d 225, 228 (4th Dist. 1979).

This Court has held that, "[o]n review here of state convictions, all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court." Watts v. Indiana, 338 U.S. 49, 50 (1949); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960).

Petitioner now urges this Court to review the appellate court's factual determination that he was proven guilty beyond a reasonable doubt. Petitioner raises no federal question and thus, has not met a fundamental requirement to invoke the jurisdiction of this court.

Further, application of the reasonable doubt standard to any particular set of facts is not a matter of general importance meriting this Court's attention. As Justice Holmes once observed, "[w]e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). Although in In re Winship, 397 U.S. 358 (1970), this Court held that the State in a criminal case is Constitutionally required to prove an accused guilty of the charges against him beyond a reasonable doubt, respondent's

research of this Court's reported opinions reveals not one case in which this Court has exercised its discretionary jurisdiction to consider the question of whether an accused was in fact proven guilty beyond a reasonable doubt. Application of the standard to a particular factual situation is simply not a question of general importance.

Moreover, in the present case the People did prove petitioner's guilt beyond a reasonable doubt. At the trial in this case, petitioner testified in his own behalf and attempted to explain that he shot and killed the victim accidentally. The trial court weighed petitioner's testimony along with other evidence presented and found petitioner's version of the incident to be improbable, incredible and contrary to the physical evidence. Thus, from petitioner's undisputed act of knowingly engaging in a

struggle while holding a loaded gun with his finger on the trigger so that the gun was capable of being fired instantly, along with other evidence presented, the trial court correctly inferred the requisite intent to commit murder. The appellate court agreed with the trial court and specifically found the trial court's findings of sufficient evidence warranted. Apparently, the Illinois Supreme Court also agreed since this was the sole issue raised in the petition for leave to appeal to that court and that petition was denied.

Not only was the lower court's determination as to the sufficiency of the evidence correct, this case does not merit review by this Court both because no federal question is presented and because the question presented is not a matter of general importance. Therefore, the petition for writ of certiorari should be denied.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the respondent respectfully prays that this Honorable Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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